82-289

NO.

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

GARY AVANT GREEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

THOMAS M. CARPENTER, Esquire
LESSENBERRY & CARPENTER
807 West Third Street
Little Rock, Arkansas 72201
(501) 372-4040

Counsel for Petitioner

QUESTION PRESENTED

1. WHETHER A SEARCH CAN BE JUSTIFIED AS LAWFUL ON THE BASIS OF CONSENT WHEN THAT "CONSENT" HAS BEEN GIVEN ONLY AFTER THE OFFICIAL CONDUCTING THE SEARCH HAS ASSERTED THAT HE MAY OBTAIN A SEARCH WARRANT AND TEAR DOWN A DWELLING, AND HAS MADE OTHER THREATS.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Gary Avant Green, [hereafter Green], presently on appeal bond pending final judgment of a sentence of five years for possession and conspiracy to possess, petitions for a writ of certiorari to review the affirmance of his conviction and sentence by the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit affirming Green's conviction and sen-

tence is reported at *United States v. Green*, 678 F.2d 81 (8th Cir. 1982). A copy of the opinion is included in the Appendix.

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit was rendered on May 24, 1982. Mr. Justice Blackmun granted an extension of time to file a petition for writ of certiorari to and including August 18, 1982. The Court's jurisdiction is invoked under 28 U.S.C. §1254 with Green asserting here, and having asserted below, a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment, United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Green was convicted of possession of a controlled substance, intention to deliver a controlled substance, and conspiracy with intention to deliver a controlled substance in violation of 21 U.S.C. §§841, 846. After a jury trial he was sentenced to five years imprisonment with an additional special parole term of three years. The indictment

charging these offenses alleged that the transactions occurred between September 1, 1980, and October 7, 1980.

On October 7, 1980, Jorge Alvarez was staying in Green's farmhouse in Mayflower, Faulkner County, Arkansas. The farmhouse was under surveillance by law enforcement authorities for the State of Arkansas, the local counties, and the Federal Drug Enforcement Administration. After an undercover agent had purchased a quantity of cocaine from Alvarez a decision was made to arrest Alvarez and search the house.

Sometime between 4:00 a.m. and 5:30 a.m. [R. 110, Motion], several law enforcement officers — under the direction of D.E.A. Agent Michael Hurley — entered Green's farmhouse and arrested Alvarez. The officers did not have an arrest warrant or a search warrant to enter the home. Hurley commented that he did not think it was necessary to obtain the warrant.

While Alvarez was under arrest he was asked about certain items that the officers were seeking. He did not tell them where these items were nor did he consent to any kind of search. Alvarez was threatened with deportation, having his girl friend arrested, and having a search warrant obtained and the house torn apart before he finally gave consent just prior to being taken to police headquarters. As a result of the search cocaine was discovered behind a bathroom wall, money and a gun were seized from beneath a mattress, and cocaine was recovered from the vacuum cleaner bag. [R. 110, 37, 19, Motion].

Green filed a timely motion to suppress the evidence obtained as a result of this illegal search. He claimed standing because of a legitimate expectation of privacy in his

farmhouse and further claimed that Alvarez had not given a free and voluntary consent to search the house. Green claimed that Alvarez' consent was obtained as a result of (1) the government representing it could obtain a search warrant and tear down the house; (2) threats against Alvarez' girl friend; (3) promises of leniency for Alvarez' cooperation; (4) Alvarez having used cocaine at the time consent was given.

The trial court denied Green's motion to suppress. After the verdict Green appealed his conviction. During the pendency of the appeal information was brought to Green by one of the witnesses for the United States indicating that the witness had lied. Further, an undercover agent that had been present at the farmhouse came forward and stated that the search had not been the result of a voluntary consent. The trial court heard this additional evidence and denied a motion for new trial.

The rulings of the trial court were affirmed by the United States Court of Appeals. The ruling of the Court of Appeals indicated that the trial court's findings of fact should not be disturbed on appeal.

Green seeks review by this Court to answer the questions presented — i.e., can consent obtained as a result of the subtle and overt pressures outlined above be deemed voluntary for purposes of the Fourth Amendment? Green seeks a writ of certiorari from this Court to review the decision of the United States Court of Appeals for the Eighth Circuit.

REASON FOR GRANTING THE WRIT

WHEN A LAW ENFORCEMENT OFFICER CLAIMS THAT HE CAN OBTAIN A SEARCH WARRANT AND TEAR A HOUSE DOWN HE ANNOUNCES IN EFFECT THAT THE OCCUPANT HAS NO RIGHT TO RESIST THE SEARCH AND ANY CONSENT GRANTED UNDER SUCH A SITUATION IS COERCED.

The Fourth Amendment guarantees that people will be secure from unreasonable searches and seizures. If a search is conducted without a warrant having been issued by an independent magistrate upon a showing of probable cause it is considered to be *per se* unreasonable. The reasonableness of the governmental intrusion can be established if the government can show that the search falls under a clearly delineated exception to the warrant requirement.

One of these recognized exceptions is that the search was conducted pursuant to a valid consent to search. *Vale v. Louisiana*, 399 U.S. 20 (1970). If the consent is not freely and voluntarily granted, then any search conducted pursuant to that consent is unreasonable and the fruits of that search must be suppressed. *Schneckcloth v. Bustamonte*, 412 U.S. 218 (1973). The key is to look to the totality of the circumstances and determine if the government has met its burden of showing a valid consent to search.

The issue squarely presented in this case is whether a representation by the government that if consent is not given then a warrant will be obtained and the house torn apart renders the subsequent consent involuntary. Green contends that this type of coercion is improper and the resulting consent invalid. *United States v. Watson*, 423 U.S.

411, 424 (1976); *Bumper v. North Carolina*, 391 U.S. 543 (1968).

In *Bumper v. North Carolina, supra*, the Court held that consent granted after an assertion by the government that it had a warrant that did not exist was nonconsensual, and the fruits of the resultant search were suppressed. 391 U.S. at 803. This case carries the issue one step further and invites the Court to determine if a search based in part upon governmental assertions of what *can* be done if consent is not forthcoming renders the consent involuntary.

In this case several factors were relied upon in getting the "consent." First, and foremost, was the threat that if the consent were not forthcoming a warrant would be obtained and a house torn apart. (It is doubtful that a warrant to tear a house apart could be obtained except upon a most unusual showing of probable cause). Also, the threat of possible deportation was suggested. A threat was made as to penalties that could be imposed if consent were not given and the full sanctions of the law were applied against the defendant. A threat was made as to the safety of the defendant's girl friend. All of this pressure was brought to bear upon a man 1000 miles from home, surrounded by armed law enforcement agents, unfree to leave, and "free basing," cocaine.

The Court has recognized that threats, promises, and subtle forms of coercion can be present to "flaw," the judgment of a person giving consent. *United States v. Watson*, 423 U.S. at 424. Indeed, various courts around the country have dealt with what constitutes "subtle," coercion in different ways.

Holding a person incommunicado for a period of time is sufficient to invalidate an otherwise apparently valid

consent to search. *United States v. Rothman*, 492 F.2d 1260 (9th Cir. 1973). Fear of loss of public assistance (not unlike fear of more severe criminal penalties), is sufficient to invalidate an otherwise apparently valid consent. *Reyes v. Edmund*, 472 F. Supp. 1218 (D.C. Minn. 1979). Duress created in part by the inability to leave is sufficient to overcome an apparent consent to search. *United States v. Nembhard*, 512 F. Supp. 15 (D.C. Minn. 1980). Being told that a search warrant can be obtained can render invalid a "voluntary," consent. *United States v. Molt*, 589 F.2d 1247 (3rd Cir. 1978). Even the threat to tear a house apart pursuant to warrant if consent is not forthcoming is sufficient to invalidate an otherwise valid consent. *United States v. Kampbell*, 574 F.2d 962 (8th Cir. 1978).

This Court has stated that the Fourth Amendment requires that

> . . . consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion were applied, the resulting "consent," would be no more than a pretext for unjustified police intrusion against which the Fourth Amendment is directed. *Schneckcloth v. Bustamonte*, 412 U.S. at 228.

This case provides the Court the opportunity to breathe life back into this constitutional guarantee as opposed to permitting a steady erosion of the right to remain free from such governmental intrusion. See *United States v. Green*, 678 F.2d 81 (8th Cir. 1982); *United States v. Stephenson*, 542 F.2d 1094 (9th Cir. 1976); *United States v. Culp*, 472 F. 2d 459 (8th Cir. 1973).

The Court should grant certiorari and set this matter for argument. Upon review the decision of the United States Court of Appeals for the Eighth Circuit should be reversed, the cause remanded to the trial court with instructions to grant the motion to suppress, and all evidence seized as a result of this illegal search should be excluded. *Wong Sun v. United States*, 371 U.S. 471 (1963).

CONCLUSION

The petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be granted, the decision of that court reversed on the issue set out above, and the cause remanded to the District Court with instructions to enter an order suppressing the fruits of the illegal search upon retrial. This Court should set this matter for oral argument.

Respectfully submitted,

THOMAS M. CARPENTER, Esquire
LESSENBERRY & CARPENTER
807 West Third Street
Little Rock, Arkansas 72201
(501) 372-4040

Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Thomas M. Carpenter, a member of the Bar of this Court, and counsel for petitioner herein, do hereby certify that a true and correct copy of the foregoing petition and the accompanying appendix have been served on all opposing counsel this 18th day of August, 1982, by mailing, first class postage prepaid, copies of same to the Honorable Don Curdie, Assistant United States Attorney, United States Courthouse and Post Office, Little Rock, Arkansas 72203, and to the Honorable Wade Hampton McCree, Jr., Solicitor General of the United States, Department of Justice, Tenth and Constitution Avenue, Washington, D.C. 20530.

/s/ Thomas M. Carpenter
Counsel for Petitioner

UNITED STATES OF AMERICA, Appellee,

v.

GARY GREEN, Appellant.

UNITED STATES OF AMERICA, Appellee,

v.

GARY GREEN and JOSE CHAVERRA, Appellants.

Nos. 81-1502, 82-1055.

United States Court of Appeals, Eighth Circuit.

Submitted April 15, 1982.

Decided May 20, 1982.

Defendant was convicted in the United States District Court for the Eastern District of Arkansas, Garnett Thomas Eisele, Chief Judge, on drug-related charges, and he appealed. Additionally, defendant and a codefendant appealed from an order of the district court which denied a new trial motion. The Court of Appeals, Bright, Circuit Judge, held that record supported district court's conclusion that occupant voluntarily consented to search of defendant's farmhouse notwithstanding contention that occupant was incapable of voluntarily consenting because he was high on drugs at the time.

Affirmed.

1. Criminal Law — 1158(1)

Reviewing court will not reverse findings of district court, which are based on credibility determinations, as

long as substantial evidence exists to support conclusions reached and no clear error appears on the record.

2. Searches and Seizures — 7(28)

Record supported district court's conclusion that occupant voluntarily consented to search of defendant's farmhouse notwithstanding contention that occupant was incapable of voluntarily consenting because he was high on drugs at the time. U.S.C.A. Const. Amend. 4.

George W. Proctor, U. S. Atty., Don N. Curdie, Asst. U. S. Atty., Little Rock, Ark., for appellee.

Mays, Crutcher & Brown, P. A. by Darrell F. Brown, Little Rock, Ark., for appellant Chaverra.

Lessenberry & Carpenter by Thomas M. Carpenter, Little Rock, Ark., for appellant Green.

Before BRIGHT and HENLEY, Circuit Judges, and BARTLETT, District Judge.*

BRIGHT, Circuit Judge.

Gary Green appeals his convictions for possession of cocaine with intent to distribute and conspiracy to possess a schedule II controlled substance (cocaine) with intent to distribute, in violation of 21 U.S.C. §§841(a) and 846. Following a jury trial, the district judge[1] sentenced Green to

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*D. BROOK BARTLETT, United States District Judge for the Western District of Missouri, sitting by designation.

[1]The Honorable G. Thomas Eisele, Chief Judge, United States District Court for the Eastern District of Arkansas.

five years' imprisonment on each count, to run concurrently, plus a special parole term of three years.

In the same case, the jury also found Jose Chaverra guilty of conspiracy to possess cocaine with intent to distribute. The district court sentenced Chaverra to a term of imprisonment for five and one-half years. Chaverra did not appeal his conviction.

While Green's appeal remained pending before this court, Green and Chaverra each filed a motion for a new trial on the grounds of newly discovered evidence. These motions alleged that police had unlawfully obtained cocaine and other evidence from Green's farmhouse. This court, while retaining jurisdiction over Green's initial appeal, remanded the case to the district court for its consideration of Green's motion for a new trial. The district court denied the new trial motions of both defendants. Green and Chaverra each appealed from that order.[2] We now affirm the convictions of Gary Green as well as the order denying Green and Chaverra a new trial.

The issues on appeal focus on the seizure of cocaine from Green's farmhouse in Mayflower, Faulkner County, Arkansas. Law enforcement officers obtained permission to search Green's farmhouse from Jorge Alvarez, who was using the house for drug traffic at the time. Green concedes that he permitted Alvarez to stay at the farmhouse, but contends that Alvarez did not have authority to consent to a search of the house and, alternatively, that police used

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[2]The appeal from the order denying a new trial to Green and Chaverra bears docket No. 82-1055, Green's initial appeal carries docket No. 81-1502.

coercion and unlawful threats in obtaining Alvarez' consent to search.[3]

The Government's evidence indicates that Alvarez obtained cocaine from Chaverra in Miami, Florida, and that Alvarez, in turn, sold the cocaine to customers provided by Green. Green permitted Alvarez to stay in Green's farmhouse, and to use the farmhouse to distribute cocaine. For his part in bringing customers to Alvarez, Green received $100 on the sale of each ounce of cocaine.

The incident leading to the arrests and indictment of Green and Chaverra occurred in October 1980. On October 6, an informant, John Healey, brought Alvarez into contact with Mike Lowery, an undercover agent posing as a customer. Lowery purchased two ounces of cocaine from Alvarez for $4,200. Thereafter, in the early morning hours of October 7, Lowery attempted to negotiate an additional purchase of cocaine. In the course of these negotiations, Alvarez invited undercover agent Mike Hurley into the farmhouse. Hurley posed as Lowery's associate. Instead of making the purchase, however, Hurley and other law enforcement agents arrested Alvarez, gave him *Miranda* warnings, and sought his cooperation in obtaining evidence against Green. Alvarez consented to a search of the farmhouse. He led the law enforcement agents to a mattress

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[3]The district court rejected this latter contention in denying Green's pretrial motion to suppress the evidence seized. In his posttrial motion for a new trial, Green alleged additional information that police coerced Alvarez into consenting to the search of the farmhouse. Following a hearing, the district court denied the motion for a new trial.

Although Chaverra did not appeal his conviction, he now asserts that the evidence produced on the motion for a new trial demonstrates perjury by law enforcement officers. He contends that this perjury so infected his trial as to entitle him to a new trial.

under which he had placed the money he had obtained from them in the previous drug transaction. He also showed the agents where he had hidden some cocaine in a vacuum cleaner and stated that he had placed an additional supply of cocaine behind a board in the bathroom wall. The agents then removed the board and retrieved the cocaine.

The trial court determined that Alvarez, as an occupant of the farmhouse, possessed the authority to consent to a search of the premises. *See United States v. Matlock*, 415 U.S. 164, 171 n.7, 94 S.Ct. 988, 993 n.7, 39 L.Ed. 2d 242 (1974). Green does not seriously contest this determination. Instead, Green and Chaverra assert that the seizure of evidence from Green's farmhouse violated the Fourth Amendment, because Alvarez did not voluntarily consent to the search and seizure. They maintain that Alvarez was incapable of voluntarily consenting, because he was high on drugs at the time. In addition, Green and Chaverra allege that the law enforcement officers coerced Alvarez into consenting to the search. Specifically, they allege that the law enforcement officers at the scene threatened Alvarez with deportation, threatened to arrest his girl friend if he did not cooperate, and told him that the officers could obtain a search warrant and tear the house apart if he did not turn over the drugs and money.[4]

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[4]Green and Chaverra introduced testimony from Officer Woodward at a hearing on their motions for a new trial, to bolster their claims that the police had obtained Alvarez' consent by threats. Woodward testified that Alvarez requested an attorney and that he overheard an officer tell Alvarez that Alvarez could get 20 years and be deported. In addition, Green and Chaverra introduced testimony by John Healey, who, in recanting his previous testimony, indicated that Alvarez had been threatened by the police and was high on drugs at the time he gave his consent.

The court discredited much of Healey's and Woodward's testimony and determined that the incidents to which Woodward testified, even if true, would not affect the voluntariness of Alvarez' consent.

[1, 2] The parties hotly contested the voluntariness of Alvarez' consent. Alvarez testified for the Government at the suppression hearing, and his testimony supported the district court's finding that he consented to the search and seizure of the evidence without any unlawful coercion. We will not reverse the findings of the district court, which are based on credibility determinations, as long as substantial evidence exists to support the conclusions reached and no clear error appears on the record. *United States v. Weeks*, 645 F.2d 658, 659-60 (8th Cir. 1981); *United States v. Mullins*, 487 F.2d 581, 589 (8th Cir. 1973). The record in this case supports the district court's conclusion that Alvarez voluntarily consented to the search and seizure of the evidence.[5] Inasmuch as the district court's finding that Alvarez voluntarily consented to the search rested on credibility determinations supported by the record, it also properly denied Green and Chaverra's motions for a new trial.

Accordingly, we affirm Green's convictions and the order denying Green and Chaverra a new trial.

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[5]Our decision in this case is not inconsistent with our ruling in **United States v. Kampbell**, 574 F.2d 962 (8th Cir. 1978). In **Kampbell**, we affirmed the trial court's order suppressing evidence on the ground that the defendant had not voluntarily consented to a search of his home. Our affirmance rested on the trial judge's superior opportunity to assess the credibility of witnesses. **Id.** at 964. Thus, although in this case Judge Eisele reached a conclusion contrary to that reached in **Kampbell**, the decision rests on supportable credibility determinations made by the trial judge. **See also United States v. Culp**, 472 F.2d 459 (8th Cir.), **cert. denied**, 411 U.S. 970, 93 S.Ct. 2161, 36 L.Ed. 2d 692 (1973).

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JOEL M. GERSOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a third-party occupant's consent to the search of petitioner's farmhouse was voluntary.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-289

GARY AVANT GREEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-6) is reported at 678 F.2d 81. The district court did not issue a written opinion.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1982. On July 20, 1982, Justice Blackmun extended the time within which to file a petition for a writ of certiorari to and including August 18, 1982, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Arkansas, petitioner was convicted on one count of possessing cocaine with intent to

distribute, in violation of 21 U.S.C. 841(a), and one count of conspiring to commit that offense, in violation of 21 U.S.C. 846. He was sentenced to concurrent five-year terms of imprisonment on each count, to be followed by a special parole term of three years (Pet. App. A-2 to A-3). The court of appeals affirmed (*id.* at A-6).

1. The evidence at trial showed that Jorge Alvarez obtained cocaine from petitioner's co-defendant Jose Chavez in Miami, Florida, and sold the cocaine to customers provided by petitioner. Petitioner permitted Alvarez to stay in petitioner's farmhouse and to use the farmhouse to distribute cocaine. As compensation for providing Alvarez with customers, petitioner received $100 on the sale of each ounce of cocaine (Pet. App. A-4).

On October 6, 1980, John Healey, an informant, introduced Alvarez to Mike Lowery, an undercover agent posing as a customer. Lowery purchased two ounces of cocaine from Alvarez for $4,200. During the early morning hours of October 7, Lowery attempted to purchase additional cocaine from Alvarez. In the course of these negotiations, Alvarez invited into the farmhouse an undercover agent, Mike Hurley, who was posing as Lowery's associate. Instead of making the purchase, Hurley and other law enforcement agents arrested Alvarez, who subsequently consented to a search of the farmhouse (Pet. App. A-4). Alvarez led the agents to a mattress under which he had placed the money he had received from Lowery in the previous cocaine sale. He also showed the agents a vacuum cleaner in which he had hidden some cocaine and stated that he had placed additional cocaine behind a board in the bathroom wall. The agents retrieved the cocaine from these locations (*id.* at A-4 to A-5).

2. Prior to trial, petitioner moved to suppress the evidence seized from his farmhouse on the ground that the law enforcement agents had coerced Alvarez' consent to search.

The government's primary witnesses at the suppression hearing were Alvarez and Agent Hurley. Alvarez testified that after he was arrested and handcuffed Hurley told him that it would be better for him if he cooperated with the agents by showing them where the cocaine was concealed (S.H. 36, 66, 169).[1] According to Alvarez, Hurley told him that if he did not consent to the search, the agents would obtain a search warrant that would authorize them to "tear up" the farmhouse (*id.* at 63-64) and that they would bring charges against Alvarez' girlfriend (*id.* at 40, 169), who was present in the farmhouse at the time of the arrest (*id.* at 63). Alvarez testified that he thereafter signed a consent form (*id.* at 38) and led the agents to the cocaine (*id.* at 37, 38-40). He also testified that the agents had given him the choice whether or not to sign the form and that his head had been clear at the time he signed it (*id.* at 37, 69, 73, 74).

Agent Hurley testified that after arresting Alvarez and advising him of his constitutional rights he told Alvarez that if he would agree to cooperate and show the agents where the cocaine and money were hidden, the agents would recommend to the United States Attorney that he be charged with only one count, even though he could be charged with three or four (S.H. 115, 125). Hurley expressly denied that he had threatened to arrest Alvarez' girlfriend if Alvarez did not cooperate (*id.* at 125, 126). Indeed, he testified that he made it clear to Alvarez from the beginning that "as an expression of our good faith" the agents would not charge his girlfriend (*id.* at 126).

The district court denied petitioner's motion to suppress. The court concluded that "the officers [did not] actually threaten[] to tear down the [farmhouse]," but rather "told

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[1] "S.H." refers to the transcript of the pre-trial suppression hearing, held on January 20-21, 1981. "Tr." refers to the transcript of the hearing on the motion for a new trial.

[Alvarez] they could get a search warrant and that search warrant would authorize them to tear down the place to find what was there that was being legitimately searched for" (S.H. 194). Although the court credited Alvarez' testimony that Agent Hurley said he would prosecute Alvarez' girlfriend if Alvarez did not cooperate (*id.* at 197), the court found that the agents did not go "beyond telling [Alvarez] what the law would permit them to do" and held that that is "a factor that law officers should be able to put into the equation and a person be able to make a judgment as to whether he wants to consent or not" (*id.* at 194).

3. Eight months after his conviction, while his appeal was pending, petitioner moved for a new trial under Fed. R. Crim P. 33 based on newly discovered evidence. At the hearing on the motion John Healey, who had been the government's informant, and Bobby Woodward, a Pulaski County Sheriff's Office Deputy who was present at the scene of Alvarez' arrest, testified that Officer Sam Williams of the Little Rock Police Department had told Alvarez that he would receive a 20-year prison sentence and would be deported if he did not show the agents where the cocaine was located (Pet. App. A-5 n.4; Tr. 18, 48). On rebuttal, Officer Williams testified that he made no such threats (Tr. at 269).

The district court denied petitioner's motion for a new trial (Pet. App. A-5 n. 4). It held that Woodward's testimony could not provide the basis for a new trial because Woodward had been available to testify at the pre-trial hearing (Tr. 300). The court found that Healey's testimony was motivated by his belief that Agent Hurley had been responsible for Healey's having lost his position with the Pulaski County Sheriff's Office (*id.* at 304). The court also stated that it did not believe Woodward's and Healey's

testimony about the alleged threats (*id.* at 303, 306), but that in any event statements about what authorities could do within the law were not improper (*id.* at 303).

4. The court of appeals affirmed (Pet. App. A-1 to A-6). It observed that the findings of the district court were based on credibility determinations and concluded that substantial evidence supported the district court's finding that Alvarez had voluntarily consented to the search and seizure of the evidence (*id.* at A-6).

ARGUMENT

The petition raises matters properly entrusted to the discretion of the trial court. The fact-bound question whether Alvarez voluntarily consented to the search of petitioner's farmhouse was resolved against petitioner by both courts below and warrants no further review by this Court.

1. It is unclear whether petitioner challenges the findings of underlying fact made by the district court or whether he contends that as a matter of law the underlying facts found by the court could not support a finding of voluntariness. Either claim is without merit. As this Court held in a case also involving consent to search, "[v]oluntariness is a question of fact to be determined from all the circumstances." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 248-249 (1973). A district court's finding regarding the voluntariness of a consent to search should not be overturned unless it is clearly erroneous. See, *e.g.*, *United States* v. *White*, 617 F.2d 1131, 1134 (5th Cir. 1980); *United States* v. *Race*, 529 F.2d 12, 15 (1st Cir. 1976). This is particularly so in cases such as the present one in which the district court's conclusion depends on an assessment of credibility. See, *e.g.*, *United States* v. *Weeks*, 645 F.2d 658, 659-660 (8th Cir. 1981). The court here heard extensive testimony from those who were present at the farmhouse when Alvarez consented to the search, including Alvarez himself, and it made specific and careful

findings based on an assessment of the credibility of the various witnesses and consideration of all the circumstances. The court of appeals correctly concluded that there was no reason to question the district court's credibility determinations and that the court's findings were supported by substantial evidence and were not clearly erroneous.

2. Petitioner's principal argument (Pet. 5-6) is that Alvarez' consent could not be voluntary because agents told Alvarez that if he did not consent to the search they would obtain a warrant that would authorize them to "tear up" the farmhouse. This statement by the agents did not render the consent involuntary. The district court found (S.H. 158-159, 194) that the agents did not actually threaten to "tear up" the house, but merely explained to Alvarez that they could obtain a search warrant that would authorize them to do so if that were necessary to find the cocaine. Petitioner does not suggest that there was any element of deception in the statement of the agents. In fact, there clearly was probable cause to support issuance of a warrant based on the fact that agents had purchased cocaine at the farmhouse the day before and that they were in the process of making an additional purchase at the time of Alvarez' arrest. Numerous courts have held that a statement by law enforcement officers that they will obtain a search warrant if consent is not given does not operate to render consent involuntary if a search warrant could in fact have been obtained. See, *e.g.*, *United States* v. *Lace*, 669 F.2d 46, 52-53 (2d Cir. 1982); *United States* v. *White*, *supra*, 617 F.2d at 1134; *United States* v. *Miller*, 589 F.2d 1117, 1132 n.13 (1st Cir. 1978), cert. denied, 440 U.S. 958 (1979); *United States* v. *Agosto*, 502 F.2d 612, 614 (9th Cir. 1974); *United States* v. *Culp*, 472

F.2d 459, 461 n.1 (8th Cir.), cert. denied, 411 U.S. 970 (1973), and cases cited therein.[2]

3. Petitioner also contends (Pet. 6) that Alvarez' consent was involuntary because the agents allegedly told Alvarez he would be deported and would receive a 20-year prison sentence if he did not consent to the search and allegedly threatened the safety of his girlfriend.[3] The allegations about statements concerning deportation and a prison sentence were made by John Healey and Officer Woodward for the first time during the hearing on petitioner's motion for a new trial eight months after his conviction. The district

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[2]Neither *United States* v. *Molt*, 589 F.2d 1247 (3d Cir. 1978), nor *United States* v. *Kampbell*, 574 F.2d 962 (8th Cir. 1978), supports petitioner's argument. In both *Molt* and *Kampbell*, unlike this case, the district court had found on the basis of all the circumstances that consent was not given voluntarily. In *Molt* the district court found that agents had misrepresented the scope of their authority to search, and the court of appeals upheld that conclusion. 589 F.2d at 1250. No such misrepresentation occurred in this case. In *Kampbell* the district court determined that an agent's statement that he could obtain a warrant that would authorize him to " 'tear the paneling off the walls,' " taken with all other circumstances, implied that the agents in fact intended to " 'tear the place apart.' " 574 F.2d at 963. The court of appeals affirmed, citing "the trial judge's superior opportunity to assess the credibility of the witnesses * * *" (*id.* at 964). Here the court of appeals correctly observed (Pet. App. A-6 n.5) that although the district court "reached a conclusion contrary to that reached in *Kampbell*, the decision rests on supportable credibility determinations * * *."

[3]Petitioner also notes (Pet. 6) that Alvarez had been using cocaine prior to his arrest. The district court inquired carefully into this point and heard testimony from Alvarez and others concerning the effect of the cocaine on Alvarez' state of mind (*e.g.*, S.H. 134-135, 167-172, 175-179, 182-186, 190-191). The court concluded that Alvarez "was rational and was perceptive and was aware of what was going on" and that "he was rationally dealing with the situation as he was confronted with it and making choices that he felt to be in his best interest and in the best interest of his girlfriend" (*id.* at 192).

Petitioner also refers to the fact that Alvarez was under arrest at the time he consented to the search, but apparently does not contend that

court not only found that this "evidence" was in part not newly discovered, but it expressly discredited the allegations (Tr. 303, 306).

In addition, there is nothing in the record to suggest that the agents threatened the safety of Alvarez' girlfriend. Alvarez testified (S.H. 40, 169) that Agent Hurley told him that his girlfriend would be charged if he did not cooperate with them. However, the district court found that the agents did not go "beyond telling [Alvarez] what the law would permit them to do" (*id.* at 194) and that the agents were in effect negotiating with Alvarez for his cooperation (*id.* at 159-160).[4] Such negotiations did not render Alvarez' consent to search involuntary. See, *e.g.*, *United States* v. *Culp*, *supra*, 472 F.2d at 462 (consent to search not involuntary when obtained in exchange for a promise by police to "go easy" on defendant's wife); *United States* v. *Race*, *supra*, 529 F.2d at 15 (hour-long negotiation with prosecutor did not render consent to search involuntary). See also *United States* v. *Weeks*, *supra*, 645 F.2d at 659.[5]

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this fact rendered the consent involuntary. See *United States* v. *Watson*, 423 U.S. 411, 424 (1976) (fact of custody alone has never been enough in itself to demonstrate a coerced consent to search).

[4]Petitioner does not contend that the agents lacked probable cause to arrest Alvarez' girlfriend.

[5]Courts also have held that promises of leniency for a family member will not render a guilty plea involuntary. See, *e.g.*, *United States* v. *Turst*, 576 F.2d 396, 397-398 (1st Cir. 1978); *United States* v. *Bartoli*, 572 F.2d 188, 189 (8th Cir.), cert. denied, 438 U.S. 905 (1978); *United States* v. *Carlino*, 400 F.2d 56, 58 (2d Cir. 1968), cert. denied, 394 U.S. 1013 (1969).

Even if Alvarez' consent had been involuntary, admission of the evidence obtained from the search would have been harmless error. The money and cocaine discovered in the course of the search were cumulative to the other evidence at trial, including the testimony of Alvarez and Healey concerning petitioner's role in the cocaine sales.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

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